88-1226

Supreme Court, U.S.
FILED
JAN 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

No._____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

EARL BRYANT,

PETITIONER,

VS.

THE PEOPLE OF THE STATE OF CALIFORNIA,

RESPONDENT.

_____/

_____

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ALAMEDA, APPELLATE DEPARTMENT

_____

PETITION FOR WRIT OF CERTIORARI

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76 pp

THE QUESTIONS PRESENTED FOR REVIEW

1. Whether an unwritten policy between two distinct police entities whereby an individual lawfully stopped by one police entity for suspicion of driving under the influence of an alcoholic beverage is detained by that police entity while the other police entity is dispatched to the scene, without the initial police entity engaging in any means of investigation while awaiting the arrival of the dispatched unit, violates the individual's United States Constitution Fourth and/or Fourteenth Amendment rights?

2. Whether a police entitiy's detention of an individual while awaiting the arrival of a separate, dispatched police entity, without the detaining police entity employing any means of investigation in the interim, violates the individual's United States Constitution Fourth and/or Fourteenth Amendment rights?

3. Whether a police entity's detention of an individual while awaiting the arrival of a separate, dispatched police entity, without employing any means of investigation in the interim, constitutes a diligent pursuit of a means of investigation that is likely to quickly confirm or dispel police suspicions?

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NO._____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

EARL BRYANT,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ALAMEDA, APPELLATE DEPARTMENT

Petitioner EARL BRYANT respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Superior Court of California, County of Alameda, Appellate Department entered in the subject proceeding on September 20, 1988.

OPINIONS BELOW

The transcript of the hearing on

the Petitioner's California Penal Code Section 1538.5 motion for the suppression of evidence in the Municipal Court of California, County of Alameda, San Leandro-Hayward Judicial District, wherein the honorable judge denied the motion and stated his reasons for the denial, is attached hereto as Appendix "A." The unreported minute order of the Superior Court of California, County of Alameda, Appellate Department affirming the lower court's judgment is attached hereto as Appendix "B". The Appellate Department of the Superior Court did not issue a written opinion. The unreported minute order of that court denying the petition for rehearing or certification is attached hereto as Appendix "C." The unreported remittitur of that court affirming the judgment of the lower court is attached hereto as Appendix "D."

JURISDICTION

The judgment of the Municipal Court of California, County of Alameda, San Leandro-Hayward Judicial District was entered on May 22, 1987. The Superior Court of California, County of Alameda, Appellate Department affirmed the lower court's judgment on August 30, 1988. The Superior Court of California, County of Alameda, Appellate Department denied the petition for rehearing or certification on September 20, 1988. The Superior Court of California, County of Alameda, Appellate Department entered an order and judgment affirming the lower court's judgment on September 20, 1988.

The petitioner invokes the jurisdiction of this court under 28 United States Code Section 1257(3) on the ground that his rights under the Fourth and/or Fourteenth Amendments to the United States Constitution were violated.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United

States Constitution:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the places to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the United States Constitution:

Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Procedural Chronology[1]

On October 2, 1986, a criminal misdemeanor complaint was filed in the Municipal Court of California, County of Alameda, San Leandro-Hayward Judicial District charging the petitioner with a violation of California Vehicle Code Section 23152a, driving a motor vehicle while under the influence of an alcoholic beverage, as the First Count, California Vehicle Code Section 23152b, driving a motor vehicle with a blood-alcohol content of 0.10 percent or more, as the Second

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[1]Citations herein are to the Reporter's Transcript ("R.T.") from the petitioner's suppression of evidence hearing in the lower court, which is attached hereto as Appendix "A".

Count, and California Vehicle Code Section 12500a, driving a motor vehicle without a valid operator's license, as the Third Count.

On May 4, 1987, the petitioner timely filed and served a motion to suppress all evidence resulting from his unlawful detention pursuant to California Penal Code Section 1538.5 in the Municipal Court. The grounds for the suppression motion were that the length and scope of the unlawful detention of the petitioner exceeded permissible bounds and violated his United States Constitutional Fourth and/or Fourteenth Amendment rights, as well as California Constitutional rights and relevant Federal and State case law.

On May 22, 1987, the Municipal Court denied the petitioner's motion to suppress evidence reasoning that the public policy involved in and seriousness of driving under the influence cases outweigh the

intrusion involved in the detention of the petitioner. (R.T. 28: 19-22; 29: 1-2). Appendix "A").

On May 22, 1987, pursuant to a negotiated plea, the petitioner pled guilty to the First Count of the complaint and the Second and Third Counts were dismissed. The imposition of sentence was stayed pending appeal.

On June 19, 1987, the petitioner timely filed a Notice of Appeal. The Appellate Department of the Superior Court affirmed the lower court's judgment on August 30, 1988 (Appendix "B"). That same court denied a petition for rehearing or certification on September 20, 1987 (Appendix "C"). The Appellate Department of the Superior Court entered an order and judgment affirming the lower court's judgment on September 20, 1988. (Appendix "D").

STATEMENT OF FACTS

On September 27, 1986, the petitioner was stopped by the Alameda County Sheriff's Department for suspicion of driving while intoxicated (R.T. 3:19-22; 4:1-3). There were no outstanding warrants for the petitioner's arrest. (R.T. 4:19-20). The petitioner was detained for fourteen (14) minutes by the Sheriff's Deputy. (R.T. 4:12-13; 6: 7-8). During the initial four (4) minutes of the detention, the deputy made observations as to the nature of the petitioner's state of sobriety or insobriety (R.T. 7: 9-12). Four (4) minutes after the initial stop, the Sheriff's Department requested that a California Highway Patrol unit be dispatched to the scene. (R.T. 4:5-7). A California Highway Patrol unit was dispatched and arrived at the scene fourteen (14) minutes after the petitioner was initially stopped. (R.T. 4:1-11).

The total span of the detention was

fourteen (14) minutes (R.T. 4:12-13; 6: 7-8). For at least the final ten (10) minutes of the detention, the Sheriff's Deputy did nothing whatsoever to continue its investigation in the matter. (R.T. 4:13-18; 6:8-10); although members of the Sheriff's Department are fully trained for DUI stops and arrests during their academy training (R.T. 4:20-22; 5:1-2) and they routinely administer field sobriety tests. (R.T. 5:3-6). The reason advanced for the Sheriff's Department turning the petitioner over to the California Highway Patrol and not continuing with any investigation of the matter was that it is the policy of the Sheriff's Department to turn such types of alleged offenses over to the Highway Patrol. (R.T. 5:13-21; 6:1-2). The petitioner was subsequently placed under arrest by the Highway Patrol.

REASON FOR GRANTING THE WRIT

Pursuant to Rule 17.1(c) of the Rules of the Supreme Court of the United States, this Court will grant a writ of certiorari when a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

The ten (10) minute detention which is the subject of this writ arose from a policy which one police entity has with another separate and distinct police entity. (R.T. 5:13-21; 6:1-2).

This Court in the United States v. Sharpe (1985) 470 U.S. 675, 106 S.Ct.__, 84 L.Ed 2d 605 considered the role of police practice in regards to the detentions of citizens. The Sharp Court's recognition that the requirement that Terry stops be brief no matter what the

needs of law enforcement in the particular case is buttressed by several sound pragmatic considerations. First, if the police knew they must structure their Terry encounters so as to confirm or dispel the officer's reasonable suspicion in a brief time, police practices will adapt to minimize the intrusions worked by those encounters. United States v. Sharp, Id., 470 U.S. at page 693 (Justice Marshall's Concurring Opinion.) Firm adherence to the requirement that stops be brief forces law enforcement officials to take into account from the start the serious and constitutionally protected liberty and privacy interests implicated in Terry stops, and to alter official conduct accordingly. United States v. Sharp, Id.

The conduct involving the Sheriff's Department's request for the dispatching of California Highway Patrol units to suspected DUI scenes is the very type of

behavior which the Sharp case dictates should be altered so that an individual's constitutionally protected liberty interests can be respected and upheld. United States v. Sharp, Supra., 470 U.S. at pages 693-696. Such conduct assumes an even greater significance because, if it is upheld and ratified, the police can employ it to extend to any type of detention of an individual by police, whether that detention occurs as a result of a vehicular stop, a pedestrian stop or in any individual's home. That application will produce an abundance of persistent litigation on this subject. The Sharp case recognized that a Terry detention is typically just a few minutes. Anything beyond this short period of time is presumptively a de facto arrest. That presumption can be overcome by showing that a lengthier detention was not unduly intrusive, i.e. the

suspects rather than the police may have prolonged the stop. It cannot however, be overcome simply by showing that police needs required a more intrusive stop. United States v. Sharp, Supra., 470 U.S. at page 697.

In Florida v. Royer (1983) 460 U.S. 491, 500, 103 S.Ct. 1319, 1325, quoting Terry v. Ohio (1968) 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed. 2d 889, this Court stated that:

> "This much is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means available to verify or dispel the officer's suspicion in a short period of time."

Florida v. Royer, Supra., 103 S. Ct. at page 1325.

And, if the detention lasts longer and is more intrusive than necessary under the circumstances it is unreason-

able and violates the Fourth and Fourteenth Amendments to the United States Constitution. As the Supreme Court has cautioned "a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." Terry v. Ohio, Supra., 392 U.S. at page 18; see also People v. Harris (1975) 15 Cal. 3d 384, 390, 124 Cal.Rptr. 536. "A detention of an individual which is reasonable at its inception may exceed constitutional bounds when extended beyond what is reasonably necessary under the circumstances."
People v. Harris, Id.

The fact that the restraint on an individual's liberty was allegedly minimal does not make the restraint a reasonable one. The Fourth Amendment applies to all seizures of the person including those consuming no more than a minute.

(Emphasis added) People v. Spicer (1984) 157 Cal.App.3d 213, 218, 203 Cal.Rptr. 599; United States v. Brignoni-Ponce, (1975) 422 U.S. 873, 878-880, 95 S.Ct. 2574, 45 L.Ed.2d 607.

In People v. McGaughran (1979) 25 Cal.3d 577, 159 Cal.Rptr. 191, 601 P.2d 207, the California Supreme Court held that a period of ten (10) minutes constituted an unlawful detention. People v. McGaughran, Id., 25 Cal.3d at pages 590-591.

While this Court in United States v. Sharp, Supra, 470 U.S. at page 688, upheld a detention of twenty (20) minutes, Justice Marshall specifically recognized that a twenty (20) minute stop would, under most circumstances, be longer than the limited intrusion entailed by the brief stop that Terry allows. United States v. Sharp, Supra., 470 U.S. at page 697. Such a longer detention was

ruled permissible in Sharp because a suspect's own actions (flight) were the primary cause for prolonging the encounter beyond the bounds to which Terry's brevity requirement ordinarily limits such stops. United States v. Sharp, Supra., 470 U.S. at pages 687-688.

This Court in United States v. Place (1983) 462 U.S. 696, 103 S.Ct. 2637, 2642, 77 L.Ed. 2d 110, stated that a balancing test should be employed to determine if the scope and duration of an investigative detention exceeds the permissible bounds of the Fourth Amendment:

> "The exception to the probable cause requirement for limited seizures of a person recognized in Terry and its progeny rests on a balancing of the competing interests to determine the reasonableness of the type of seizure involved within the meaning of 'the Fourth Amendment general prescription against unreasonable searches and seizures.' 392 U.S. at page 20, 88 S.Ct. at page 1879. We must balance the nature and quality of the instrusion on the individual's Fourth Amendment interests against the im-

> portance of the governmental interests alleged to justify the intrusion."

United States v. Place, Supra., 462 U.S. at page 703.

The Place Court thereafter recites the two central factors that must be reviewed in applying the balancing test to determine if the Fourth Amendment bounds were exceeded in an investigative detention. These factors are the duration of the delay and whether the police were diligent in their efforts to pursue their investigation during the detention. As the court states:

> "The brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion. Moreover, in assessing the effect of the length of the detention, we take into account whether the police diligently pursued their investigation."

United States v. Place, Supra., 462 U.S. at page 709.

More recently, in United States v. Sharp, Supra., this Court once again emphasized the appropriateness and importance of reviewing the investigative efforts of law enforcement officers during the investigative detention to determine if the detention was reasonable in duration:

> "In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant."

United States v. Sharp, Supra., 470 U.S. at page 686.

In applying the balancing test discussed in United States v. Place, Supra., to determine whether the duration of the investigative detention exceeded the permissible bounds of the Fourth Amendment, the court must review the duration

of the detention and the investigative efforts of the detaining law enforcement officer(s) to determine whether the detention was reasonable and the efforts employed by law enforcement officer(s) were diligent and justified under the circumstances. United States v. Sharp Supra.; United States v. Place, Supra.; Florida v. Royer, Supra.

For a ten (10) minute period following the dispatch to the California Highway Patrol, the Sheriff's Department did absolutely nothing to pursue any means of investigation that was likely to quickly confirm or dispel its suspicions. (R.T. 4:13-18; 6:8-10). The Sheriff's deputy merely requested that a California Highway Patrol unit respond to the scene (R.T. 4:5-11) without conducting any further investigation (R.T. 4:13-18; 6: 8-10) before the arrival of the summoned unit, although Deputies of the

Sheriff's Department are fully trained for DUI stops and arrests (R.T. 4:20-22; 5: 1-2) and can routinely administer field sobriety tests. (R.T. 4:5-7).

The petitioner's subject ten (10) minute detention was therefore rendered unreasonable due to the Sheriff's Department's failure to diligently pursue a means of investigation that was likely to confirm or dispel their suspicions quickly. Consequently, the lower Courts' judgments are in conflict with United States Supreme Court and California State Supreme Court decisions. There was no reason, aside from the policy dictates between the Sheriff's Department and the Highway Patrol (R.T. 5:14-21; 6:1-2) why the Deputy Sheriff in this matter could not have performed an investigation (i.e. the conduct of a field sobriety test (R.T. 5:3-6)) in this matter regarding his alleged suspicions of the existence

of possible criminal behavior. (Please note that the record indicates that the Court did not possess much information regarding the observations of the Deputy Sheriff at the time of the original detention (R.T. 17:11-14) and that the Court did not decide the issue of probable cause to arrest). There is nothing in the record to indicate that the petitioner did anything (i.e. evasive action) to prolong his detention.

The Terry case enumerates that the purpose of an investigative detention is to allow an investigation of possible criminal behavior. (Emphasis added.) Terry v. Ohio, Supra., 392 U.S. at page 22. That purpose has been thwarted in this case by the Sheriff's Department's decision to force the petitioner to sit for an additional ten (10) minutes instead of choosing to investigate the alleged criminal behavior via the administering of a field

sobriety test or some other alternative method.

The lower Court contemplated two (2) important considerations: 1) preserving the integrity of an individual's constitutional rights to be free from unreasonable intrusions upon their liberty and 2) public policy regarding DUI cases. (R.T. 27:18-22; 28:1-18). These contemplations and concerns are well founded. However, we must not fashion public policy in a way that will erode an individual's fundamental contitutional rights. Rather, such a public policy would best be served by promoting a coexistence between satisfying that policy and the protection of those rights. An alternative to the current police detention policy and practice outlined in this case is simply to require a police entity to pursue its investigation (i.e. in this matter the requirement could be met by requiring

the administration of a field sobriety test while awaiting the dispatched unit). By compelling such a requirement the desired coexistence is best promoted.

CONCLUSION

By reason of the foregoing, a writ of certiorari should issue to review the judgment and order of the Appellate Department of the Superior Court of California, County of Alameda.

January 5, 1989.

Respectfully Submitted:

/S/ DAVID J. JAQUINT

DAVID J. JAQUINT
Attorney for Petitioner
EARL BRYANT

APPENDIX "A"

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

APPELLATE DIVISION

---oOo---

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF and RESPONDENT, -VS- EARL BRYANT, DEFENDANT and APPELLANT.	NO:_____

"REPORTER'S TRANSCRIPT ON APPEAL"

FROM THE JUDGMENT OF THE MUNICIPAL COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF ALAMEDA

APPEARANCES

FOR THE RESPONDENT: JOHN J. MEEHAN, DISTRICT ATTORNEY

FOR THE APPELLANT: DAVID J. JAQUINT, ATTORNEY AT LAW

IN THE MUNICIPAL COURT FOR THE

SAN LEANDRO-HAYWARD JUDICIAL DISTRICT,

COUNTY OF ALAMEDA, STATE OF CALIFORNIA

DEPARTMENT NUMBER SIX

BEFORE HONORABLE GARY M. PICETTI, JUDGE

---oOo---

THE PEOPLE OF THE STATE OF CALIFORNIA,	NO. 211696
PLAINTIFF,	CHARGE: 23152a VC 23152b VC 12500a VC
-VS-	
EARL BRYANT,	
DEFENDANT.	

MUNICIPAL COURT BUILDING, HAYWARD,
ALAMEDA COUNTY, CALIFORNIA

PROCEEDINGS (1538.5 MOTION)
MAY 15, 1987

APPEARANCES

FOR THE PEOPLE:	ARMANDO G. CUELLAR, DEPUTY DISTRICT ATTORNEY
FOR THE DEFENDANT:	DAVID J. JAQUINT, ATTORNEY AT LAW
REPORTED BY:	JOSEPH A. COMPARTORE, CSR #944

PROCEEDINGS

FRIDAY, MAY 15, 1987 - A.M. SESSION

---oOo---

THE COURT: Earl Bryant.

MR. JAQUINT: We are ready, Your Honor. We have a stipulation on that matter which may shorten the proceedings somewhat and which may make the case a little easier to decide.

MR. CUELLAR: Could we set forth the stipulation to see if the Court is willing to make a ruling?

MR. JAQUINT: It will involve some numbers, Your Honor, so I think you'll want to take a few minutes on that.

THE COURT: It looks like everybody is going to tell me what to do today, so why don't you.

MR. JAQUINT: In this matter, Your Honor, it involves the Sheriff's Department making a stop for a suspected DUI and then calling the CHP.

We would stipulate that the Sheriff's Department stopped the defendant at 1611 hours on September 27th, 1986.

THE COURT: All right.

MR. JAQUINT: That a request was made for the CHP unit to respond at 1615 hours, or four minutes later. That the CHP unit was actually dispatched by their radio dispatch at 1619 hours and that the CHP unit arrived on the scene at 1625 hours.

Now, we would also stipulate that there was a 14-minute detention. We would stipulate further, Your Honor, that the Sheriff's Department did nothing during that 14-minute detention to continue its investigation in the matter.

We would stipulate that there was no warrant for an arrest. We would stipulate that the Alameda County Sheriff's Department is fully trained

for DUI stops and arrests during its academy training, Santa Rita Academy.

And we would further stipulate that the Alameda County Sheriff's Department routinely administers field sobriety tests.

And based on those stipulations, Your Honor, I think counsel would agree that would be the nature of the testimony elicited from one of two officers that are here, and I believe the other officer is on standby.

MR. CUELLAR: There would be one further thing that I would add to that stipulation. If asked, Deputy Sheriff Michael Rores would testify that the reason for turning the defendant in this case over to the California Highway Patrol and not continuing with any investigation himself is that it's the policy of the Sheriff's Department

to turn these types of offenses over to the California Highway Patrol.

He would testify further that during the first three to four minutes of the detention he did infact talk to the defendant and form an opinion as to sobriety. And that there was a 14-minute detention, but I would say the time period in which he did nothing was actually more closer to 10 minutes.

THE COURT: Okay. Is there a stipulation that up to the time that he did nothing further, at least at that time there was probable cause to detain based upon the observed driving and the observed symptoms during this three to four minute conversation he had with the defendant in the case?

MR. CUELLAR: Yes, Your Honor. I don't think that's an issue.

THE COURT: Is that a stipulation?

MR. JAQUINT: We would stipulate the stop is proper, the initial stop.

THE COURT: All right. Is there any stipulation with regard to the three to four minutes that he's talking to the defendant in terms of his observations during that period of time?

MR. CUELLAR: We would stipulate that there were observations made as to the nature of the defendant's state of sobriety or insobriety.

THE COURT: And that they were consistent with an opinion that he was under the influence of alcohol?

MR. JAQUINT: That's correct.

MR. CUELLAR: Yes.

THE COURT: All right. And you accept all those stipulations?

MR. CUELLAR: Yes, Your Honor.

THE COURT: Likewise, Mr. Jaquint?

MR. JAQUINT: Yes.

THE COURT: And the Court will accept those stipulations.

And now what do you want to do?

MR. JAQUINT: Okay. As to argument, Your Honor, I don't think there's any question as to which cases are controlling in this matter. I'm sure both counsel and I would cite the United States versus Sharp at 105 Supreme Court 1568. I don't have the U.S. cite.

People versus McGaughran, I'll spell that M-c-G-a-u-g-h-r-a-n, at 25 Cal. 3d 577.

MR. CUELLAR: And People versus Spicer.

Isn't it?

MR. JAQUINT: That's correct, Your Honor.

MR. CUELLAR: And counsel has that cite.

MR. JAQUINT: Yes. It's S-p-i-c-e-r at 157 Cal. App. 3d 213.

THE COURT: What was that page number again, I'm sorry?

MR. JAQUINT: 213, Your Honor. 157 Cal. App. 3d 213.

And I think counsel and I are pretty much of the opinion that the McGaughran case is pretty much controlling in this case, Your Honor.

THE COURT: Is there a case that talks about a specific amount of time?

MR. JAQUINT: Yes, Your Honor. In the Spicer case the Court held that "the fact that the restraint on an individual's liberty was allegedly minimal does not make the restraint a reasonable one. The Fourth Amendment applies to all seizures of the person including those consuming no more than one minute." So in Spicer, Your Honor,

they held the detention as being unreasonable.

The McGaughran case, which seems to be controlling in California, the Spicer case is a Cal. App. case from California and McGaughran is a California Supreme Court case, holds that 10 minutes is an unreasonable detention if in fact no further investigation is continuing in the matter.

THE COURT: All right.

MR. CUELLAR: If I may add, Your Honor, I'm not in agreement with counsel on that particular point. I believe the cases factually deal with time periods, but the holdings of all the cases are that the Court must investigate what was being done during that time period. And it isn't whether it's a matter of 10 minutes that went by, or 20 minutes that went by, or one

minute that went by, but rather the controlling issue is, and I think it's the language from the Sharp case, whether or not the police diligently pursued a means of investigation that was likely to confirm or dispel their conviction quickly, during which time it was necessary to detain the defendant.

I think that's the controlling issue. And in the Sharp case, Your Honor, it also says that each case must be decided on its facts. And I think the McGaughran case also has language to that effect.

So to narrow it down for the Court, I think the issue is whether or not this 10 to 14 minute detention was reasonable, and whether or not anything obtained as a result of that detention should be suppressed if it was unreasonable.

Since it's counsel's motion, I would invite him to argue first and I'll rebut.

MR. JAQUINT: It sounds like we just heard argument by the D-A, but I'll continue on, Your Honor.

The Sharp case was a 20-minute detention and during that period of time there was flight by the actual defendant. He took off in his vehicle and the agencies involved gave chase. And the Court, United States Supreme Court, despite the Lower Court's ruling that it was unreasonable, maintained it was reasonable basically because it was a fugitive-type situation involved.

We don't have that in this particular case. Mr. Bryant was pulled over immediately. He was extremely cooperative. He complied with all requests of the police agencies involved. What we have then is a

distinction as to the type of detention that was actually involved and what basically went on.

The Court seems to hold in Spicer that there's three types of criterion involved in detaining citizens. The first is a consensual encounter where a police officer will simply go up to an individual and ask information, for example, to identify himself. And the basic intent for allowing that type of situation is to, from the cases I've read, is to help in crowd control or searching out fugitives and to perform warrant checks, that type of thing.

The second one, which I think is the type of encounter that applies to our case, is that of a detention which is pretty much the limited investigatory-type procedure.

And the third type of encounter is the actual arrest.

The latter two, the detention and the actual arrest, under all the cases we cited, triggers the Fourth Amendment protections against unreasonable searches and seizures.

In our particular case, Your Honor, we have a situation where the Sheriff's Department appears to be just simply too busy to do the routine investigation necessary to effectuate a DUI stop. It is my understanding the average DUI investigation takes about four hours to complete, between the transportation back and forth to Santa Rita, and they simply don't want to be involved in that. So they have delegated that authority to the California Highway Patrol.

So citizens, once they have been detained, are subject to search and seizure because of an unwritten policy, or at least I haven't been able to find

a written policy, and are detained for whatever amount of time it would take for the CHP to show up.

During that period of time, in most cases, and I think it's been stipulated in our case, very little, if anything, goes on. Once the Sheriff's Department makes up its mind that the person is suspected of being under the influence of alcohol, then they stop their investigation at that point, radio the CHP dispatch and wait for a unit to arrive.

Now, in Spicer, Your Honor, it says if they do nothing, once the Fourth Amendment has been triggered, that one minute is unreasonable.

And in the controlling case, the McGaughran case, it says anything over four minutes is unreasonable.

We're dealing with at least a 10-minute detention, actual 14-minute

detention from the point Mr. Bryant was stopped until the time the CHP actually responded.

So there is actually a dual type of investigation going on. One by the Sheriff's Department initially as to whether or not this person is suspected of driving under the influence of alcohol. Then he is detained and very little, if anything, goes on. Then the CHP comes out and does a second investigation, administers field sobriety tests and then makes the arrest.

In this case, Your Honor, Mr. Bryant had to wait 14 minutes for that second investigation to commence.

Now, the Sheriff's Department has training and are very competent, most of the sheriffs are, and can effectuate a DUI arrest. It just simply seems they choose not to because of this

unwritten policy. They choose instead to trigger the Fourth Amendment and keep people unlawfully detained.

I think that this Court has no choice, under the stipulations given in this case and the controlling cases of Spicer and McGaughran, but to find that this was in fact an unreasonable detention and the matter should be discharged.

THE COURT: I don't have much information regarding the observations of the deputy sheriff at the time of the original detention. So I don't know how the conduct or behavior meets those minimal standards of being probable cause to stop and at least detain to investigate. And the question is whether that initial authority is so attenuated by what is clearly administrative and procedural delay as to substantially interfere

with the person's rights against unreasonable search and seizure and detention for that purpose.

What I would like to do is: I would like to read the cases. Is there a date that you would be coming back shortly that I could announce my decision on?

MR. JAQUINT: Your Honor, I'm right across the street. Next Friday?

THE COURT: Do you want to do it Friday morning?

MR. JAQUINT: Friday, May 22nd, Your Honor?

THE COURT: Yes. And we will make it for 9:30. And for sure we will have a reporter by that time.

MR JAQUINT: Thank you, Your Honor.

THE COURT: Thank you, Counsel.

MR. CUELLAR: Thank you.

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PROCEEDINGS

FRIDAY, MAY 22, 1987 - A.M. SESSION

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THE COURT: Okay, People versus Earl Bryant.

Both sides ready?

MR. CUELLAR: Ready, Your Honor.

MR. JAQUINT: Ready, Your Honor.

THE COURT: Counsel approach the Bench, please. (Off-the-Record Discussion)

THE COURT: Okay. Mr. Jaquint, did you want to add any argument to your Points & Authorities?

MR. JAQUINT: Just briefly, Your Honor. We had a rather extensive argument last time.

I would like to point out to the Court that I still feel there's no justification for the Sheriff's Department policy in this matter. And that under the cases cited, Sharp,

Spicer, and the leading case of McGaughran, what happened in this particular case does amount to an unlawful detention given the time frame involved.

And because of that, and given the stipulations and the apparent lack of justification for the policy and lack of continued investigation on the part of the Sheriff's Department, I do feel it's in violation of the Fourth Amendment.

THE COURT: Do you want to be heard?

MR. CUELLAR: Yes. The McGaughran case, Your Honor, could be distinguished because the Supreme Court there specifically limited its decision on those facts, which is where the police officer stopped someone for an offense that the officer could not take the person into custody for. There is

language in that decision that specifically addresses itself to that.

That if it's an offense for which it's a citable offense and ordinarily the officer would cite the person and then let them go, than a 10-minute delay to do a warrant check is unlawful and any subsequent evidence obtained as a result of that delay should be suppressed.

That is not the case we have here. This is an offense for which an individual could have been arrested and not cited. So I think you can distinguish it on that grounds.

Secondly, I think the Court has to take into balance the intrusion involved here with the policy and the interest in the community in getting drunk drivers off the road. And when you balance a 10-minute intrusion versus the need to get people who are

driving under the influence off the road, I think that that balances out in favor of the police in this particular case.

I don't think that you can justify the policy of the Sheriff's Office in turning over these arrests. But the Court should take into account that the officer could have arrested the individual in this case, and had he arrested him before the California Highway Patrol arrived, then the detention would have been entirely lawful.

THE COURT: Did you want to close, Mr. Jaquint?

MR. JAQUINT: Yes, Your Honor.

I think the points of opposing counsel are well taken. The officer could have arrested, but he did not. At that point in time he simply kept my client waiting. And that waiting

period was beyond the balance outlined in McGaughran. And I think that McGaughran, even though counsel tries to distinguish it, is a very important California Supreme Court case.

That particular case involved a fugitive warrant on a felony. And given the seriousness of the circumstances in that case, the Supreme Court still held that the 10-minute delay was unnecessary, it was excessive, and that particular arrest and conviction had to be discharged.

Now, in our particular case, Your Honor, it involves a 56 year old black man who had never been arrested before in his life, based on a stop where the officer indicates that there may have been some erratic driving.

Surely the Court should not consider that in the same light as a fugitive that's roaming around the

streets with a felony warrant involving burglary. The gravity of the offense involved in our case is much less than the People versus McGaughran. And in that case the Supreme Court did throw out the arrest and conviction.

I think in this case, Your Honor, the detention was unreasonable. The length of time involved was highly unreasonable. And under all of the cases cited, my moving papers and oral argument last time, I feel it was a violation of my client's Fourth Amendment rights and that the arrest and the evidence obtained must be suppressed.

THE COURT: All right. Is the matter submitted at this time?

MR. CUELLAR: Submitted, Your Honor.

MR. JAQUINT: Submitted.

THE COURT: Okay. I don't think there's any question but that the policy presently being acted upon by the Sheriff's Office and the California Highway Patrol is, at best, an awkward one. And it seems to rise and fall on some very delicate grounds.

And that is: Just how many minutes are too many minutes to detain someone to wait for another agency to come along to do the investigation necessary to either clear or to make an arrest?

And we have here, if I correctly understand the stipulation, a 10-minute delay from the time that the Sheriff's Office does anything which could be characterized as an investigation, to the point where the Highway Patrol arrives at the scene.

Is that correct, 10 minutes?

MR. CUELLAR: That's correct, Your Honor.

MR. JAQUINT: The stipulation involved a 14-minute total detention.

THE COURT: 14 minutes. But it was agreed also in the stipulation that four minutes of that was at least proper from the standpoint of the Sheriff's Officer gathering certain information by which he justified the further detention.

Is that correct?

MR. JAQUINT: Three to four minutes, that's correct, Your Honor.

THE COURT: All right. Another factor involved in the stipulation, and I don't think it's necessarily a very critical one, is that the stipulation also contained information that the Sheriff's Office, due to this policy, was not as well trained in investigating driving under the

influence cases as the California Highway Patrol?

MR. JAQUINT: Your Honor, if I may correct the Court, briefly?

I think the stipulation involving the Alameda Sheriff's Department is that they are trained for making DUI stops and arrests. And further, the Sheriff's Department makes arrest for 647f's, which sobriety is a part of those arrests.

THE COURT: I understand. Obviously, the Highway Patrol has greater training with regard to DUI arrests then the Sheriff's Department. However, I don't think that is very critical.

Now, I think we are all aware that driving under the influence cases, while misdemeanors, are probably the felony of misdemeanors in today's society. And the risk involved in

terms of danger to society represented by these types of cases is very great. So I have to take that into consideration in determining the reasonableness of the situation.

This is a tough struggle. Where do we draw the line? Eight minutes, 10 minutes, 15 minutes, 20 minutes, a half hour? I don't know.

I don't take it lightly as to a 10-minute intrusion of someone's time. I think that's a very important intrusion. On the other hand, these driving under the influence cases are so very important and serious that I think that's something the Court has to take into consideration in determining the reasonableness of the detention.

I'm going to find in this case that the public policy involved and the seriousness of these cases outweigh the intrusion that was involved in the

10-minute delay. I'm going to deny the motion on that grounds.

Is there anything further or any request for any findings that you want me to make that I haven't made?

MR. CUELLAR: Not from the People, Your Honor.

THE COURT: Mr. Jaquint, did you want to add anything?

MR. JAQUINT: No. Unfortunately, these types of cases are very difficult and I realize it's been a burden on the Court. However, I would like the opportunity to review the record and make a determination whether or not we should seek a second opinion.

THE COURT: Sure. No, I have no problem with that at all. I would be curious. I think on this issue reasonable magistrates are going to differ as to what is a reasonable detention, what isn't? That just

happens to be my particular feeling about the situation.

MR. JAQUINT: Okay. Thank you very much.

THE COURT: Do you want to put this over for about a month to give you a chance to decide what you want to do, Mr. Jaquint?

MR. JAQUINT: Yes, Your Honor.

THE COURT: Why don't you give me a date?

MR. JAQUINT: June 23rd to set?

THE COURT: Sure, June 23rd, 9:30, in Department One to set.

MR. JAQUINT: Thank you very much, Your Honor, for your cooperation and concern.

THE COURT: Thank you.

MR. CUELLAR: Thank you, Your Honor.

---oOo---

STATE OF CALIFORNIA)
) ss.
COUNTY OF ALAMEDA)

I, JOSEPH A. COMPARTORE, a Certified Shorthand Reporter, do hereby certify that the foregoing is a full, true and accurate transcript of my shorthand notes taken of the aforementioned proceedings at the time and place therein indicated.

IN WITNESS WHEREOF, I have hereunto set my hand this 30th day of July, 1987.

/s/ Joseph A. Compartore
JOSEPH A. COMPARTORE, CSR #944

STATE OF CALIFORNIA)
) ss.
COUNTY OF ALAMEDA)

CERTIFICATE OF JUDGE

I, GARY M. PICETTI, Judge of the Municipal Court of the State of California, in and for the County of Alameda, do hereby certify that no objections have been made to the foregoing Reporter's Transcript On Appeal within the time prescribed by law, that the same is, therefore, approved by me.

DATED: Hayward, California, _____
_____, 1987.

/s/
JUDGE OF THE MUNICIPAL COURT

STATE OF CALIFORNIA)
) ss.
COUNTY OF ALAMEDA)

I, WAYNE LOW, Clerk of the Municipal Court of the State of California, in and for the County of Alameda, do hereby certify:

That the foregoing Reporter's Transcript On Appeal has been filed and any requests for correction having been made have been complied with within the time allowed, the same is hereby certified as correct.

DATED: Hayward, California, this _____, 1987.

CLERK OF THE MUNICIPAL COURT

BY: /s/

APPENDIX "B"

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

DEPT: 28
DATE: Aug. 30, 1988
HON Winton McKibben, **Pres, Judge**
, **Deputy Sheriff**
Ethel Christensen , **Deputy Clerk**
Not Reported , **Reporter**

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff & Respondent,

vs.

EARL BRYANT,

Defendant & Appellant.

Counsel appearing for Plaintiff:

Counsel appearing for Defendant:

NATURE OF PROCEEDINGS: APPEAL ON JUDGMENT

ACTION NO. 2145

MUNI NO. 211696

In the above entitled action, oral argument having been presented, the Court orders the judgment from the lower court affirmed 3-0 Remitittur to issue.

COPIES OF THIS MINUTE ORDER MAILED THIS DATE TO:

TIMOTHY D. CLANCY, DDA
1225 FALLON STREET
OAKLAND, CA 94612

DAVID J. JAQUINT
ATTORNEY AT LAW
225 W. WINTON AVE., STE. 205
HAYWARD, CA 94544

APPENDIX "C"

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

DEPT: 28
DATE: Sept. 20, 1988
HON Winton McKibben, **P., Judge**
, **Deputy Sheriff**
Ethel Christensen , **Deputy Clerk**
not reported , **Reporter**

People of the State of California,

Plaintiff/Respondent,

vs.

Earl Bryant,

Defendant/Appellant.

Counsel appearing for Plaintiff:

Counsel appearing for Defendant:

NATURE OF PROCEEDINGS: Appellant's Petition for Rehearing and Certification to the District Court of Appeals.

ACTION NO. 2145

MUNI NO. 211696

In the above entitled action, the Court having rendered judgment on 8-29-88, and the appellant having submitted a Petition for Rehearing of Certification, filed 9-14-88, and the

same having been taken under advisement and fully considered, comes now the Court and makes the following order(s): petition denied. Remitittur to issue.

2/28/88 9:30

COPIES OF THIS MINUTE ORDER MAILED THIS DATE TO:

TIMOTHY D. CLANCY, DDA
1225 FALLON STREET
OAKLAND, CA 94612

DAVID J. JAQUINT
ATTORNEY AT LAW
225 W. WINTON AVE., STE. 205
HAYWARD, CA 94544

APPENDIX "D"

ENTERED IN JUDGMENT BOOK
REEL 955 PG 03
SEP 20, 1988
RENE C. DAVIDSON, County Clerk

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF ALAMEDA APPELLATE DEPARTMENT

People of the State of California,	)	REMITTITUR
	)	Criminal NO. 2145
vs.	)	On Appeal from the Municipal Court of the San Leandro -Hayward Judicial District. Municipal Court No. 211696
Earl Bryant,	)	

And now, this day, this cause having been called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, comes now the Court and orders that the judgment from the lower court of the above-named Municipal Court in this action be and the same is hereby affirmed.

WINTON McKIBBEN, P.J.

ROBERT K. BYERS, J.

KEN KAWAICHI, J.

I, Rene C. Davidson, County Clerk of the Superior Court of the State of California in and for the County of Alameda, do hereby certify that the foregoing is a true and correct copy of an original judgment entered in the above entitled action on the 20th day of September, 1988 and now remaining of record in my office.

Witness my hand and the seal of the Court affixed at my office this 21st day of September, 1988.

RENE C. DAVIDSON, County Clerk

By /s/ Ethel Christensen
Deputy

NO._____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

EARL BRYANT,

PETITIONER,

VS.

THE PEOPLE OF THE STATE OF CALIFORNIA

RESPONDENT.

_____/

DECLARATION OF MAILING

I hereby certify that I am a member of the United States Supreme Court bar and that I have this date served a copy of the PETITION FOR WRIT OF CERTIORARI by depositing it in the U.S. mail, first-class postage prepaid, at Hayward, California, and addressed to the following who are all of the parties required to be served:

MR. JOHN VAN de KAMP
Attorney General
P. O. Box 944255
Sacramento, CA 94244-2550

JOHN MEEHAN
District Attorney
1225 Fallon Street
Oakland, CA 94612

SUPERIOR COURT OF
CALIFORNIA
APPELLATE DEPARTMENT
1225 Fallon Street
Oakland, CA 94612

CLERK OF THE MUNICIPAL
COURT
for Delivery to
HONORABLE JUDGE GARY
M. PICETTI
24405 Amador Street
Hayward, CA 94544

MR. EARL BRYANT
105 James River Road
Vallejo, CA 94501

Dated: January 5, 1989.
Hayward, California.

/S/ DAVID J. JAQUINT

DAVID J. JAQUINT
Attorney for Petitioner
EARL BRYANT